

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1465

B
P/S

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

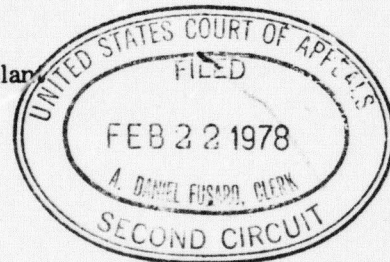
Appellee,

-v.-

DOMINGO ZAYAS, a/k/a Luis Nunez, a/k/a Luis Machado,
a/k/a Luisito, ORLANDO MACHADO, a/k/a Julito, LUIS
NUNEZ-RAMOS, a/k/a Indio, CARLOS RIVERA-SANTIAGO,
a/k/a Carlitos, ANGELO ROCHE, a/k/a The Old Man, JOSE
VELASQUEZ, a/k/a Vaquero, a/k/a Cowboy, FABIAN
RODRIGUEZ, ANTONIO MORALES, a/k/a Tony the
Mechanic, ANTHONY RODRIGUEZ, a/k/a Little Tony,
Defendants-Appellants.

JOINT BRIEF ON BEHALF OF APPELLANTS
DOMINGO ZAYAS, ORLANDO MACHADO, CARLOS
RIVERA-SANTIAGO, JOSE VELASQUEZ, FABIAN
RODRIGUEZ, ANTONIO MORALES, ANTHONY RODRIGUEZ

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PRELIMINARY STATEMENT

On May 23, 1977, a jury trial was commenced in the Southern District of New York (Broderick, J.) against 10 of 24 defendants who were charged with conspiracy to violate the narcotics laws, and with substantive counts charging possession of Schedule I Narcotic Drugs (heroin). One of the defendants, JOSE LUIS IGLESIAS, pleaded guilty at the commencement of the trial, and all of the other 9 defendants were convicted after a six-week trial, of the first count, conspiracy, and of each of the substantive counts in which they were charged (five of the defendants, Domingo Zayas, Orlando Machado, Carlos Rivera-Santiago, Antonio Morales, and Anthony Rodriquez were each charged with one substantive count; the remaining four defendants, Luis Nunez-Ramos, Angelo Roche, Jose Velasquez, and Fabian Rodriquez were each charged with two substantive counts.)

On September 19, and 23, 1977, the Appellants, Luis Nunez-Ramos, Antonio Morales, Angelo Roche, Fabian Rodriquez, Jose Velasquez and Domingo Zayas were all sentenced to 15 year concurrent prison terms on each count of which they were convicted, followed by terms of special parole. On September 19, 1977, Appellant Anthony Rodriquez was committed to the custody of the Attorney General for a study as described in U.S.C. 4205(d) and was subsequently sentenced to a 4 year prison term; Carlos Rivera-Santiago was committed for a study as described in 18 U.S.C. 4205(d) and was subsequently sentenced

to a 15 year term, followed by a term of special parole; and Orlando Machado, was sentenced to a 9 year period of imprisonment, followed by a term of special parole.

Of the 9 Appellants, seven are joining in this brief: Orlando Machado, Carlos Rivera-Santiago, Jose Velasquez, Domingo Zayas, Fabian Rodriquez, Antonio Morales, and Anthony Rodriquez. Appellants Angelo Roche and Luis Nunez-Ramos are each submitting briefs on their own behalf.

STATEMENT OF FACTS

The indictment charged a conspiracy from October, 1973 to November, 1975, which had as its objects the unlawful importation and distribution of "brown rock" heroin from Mexico (Indictment, p.32A).^{*} The Indictment also alleged that the conspiracy took the form of a "loose-knit" business organization with members carrying out "four basic functions": (1) importers, (2) organizers, supervisors, managers, controllers and financiers who "directed the activities of couriers and middle-level distributors", (3) couriers who travelled between New York and Los Angeles, and (4) customers (Indictment, 32A-33A). None of the importers or directors were tried. In some cases they were fugitives, such as Fernando Gallardo, and Martha Machado, the leaders of the organization: in other cases they were the Government's principal witnesses, Raymond Rivera, Raymond Rossy, Benito Cruz and Raymond Valentine, who testified against the lower level customer or couriers.

The testimony of the principal witnesses provided the following description of the alleged conspiracy and the events leading up to it.

The conspiracy originated when Benito Cruz, one of the principal Government witnesses, entered into an agreement with Fernando Gallardo, a fugitive at the time of the trial, to

^{*}References with an "A" suffix refer to pages in the Appendix: References preceded by "tr" refer to pages in the transcript of proceedings.

engage in the sale of heroin (tr.2036). In December, 1973, Cruz financed Gallardo who first sent George Vasquez from New York to Los Angeles to purchase heroin and bring it back (tr.2054-2056). Subsequently, in December, 1973 and January, 1974, Gallardo went there himself to make other purchases (tr.2056-2060). Except for a few months in the beginning of 1974, until the summer of 1974, Cruz received heroin from Gallardo on a steady basis, and sold it to various customers (tr.2063-2080). During that time, Cruz met various suppliers and organizers through Gallardo, including William Cortes-Rios, among others (tr.2081-2088). By June of 1974, Cruz had left his association with Gallardo to enter a narcotics-selling partnership with Jose Rivera (tr.2090-2091). From June until December of 1974, Cruz purchased no heroin from the Gallardo organization (tr.2090-2091).

It was during the summer of 1974 when a high officer in the Gallardo organization, William Cortes-Rios, recruited Raymond Rivera to take charge of getting the heroin from California to New York and to distribute it on behalf of the chief of the organization, Fernando Gallardo (tr.207-208). On his first trip to California, Raymond Rivera was accompanied by Cortes-Rios who introduced him to a Mexican named Hector who delivered the heroin to them, and who was told that in the future Rivera would be picking up the heroin (tr.218-224). On that occasion, Cortes-Rios and Rivera gave Hector \$25,000 which they had brought in a suitcase and received eleven 9-ounce

packages of heroin from Hector (tr.224-225). When they returned to New York with the heroin, Cortes-Rios distributed the heroin to his customers. Among others, Rivera testified that he distributed 2 packets to Jose Velasquez, and 2 to Angelo Roche. He introduced them to Raymond Rivera and advised them that Rivera would be taking his place in the future (tr.235-248).

During that time, in August of 1974, Rivera realized that he would need assistance in the distribution and storage of the large amounts of heroin in which he was dealing and so - with the permission of Fernando Gallardo - he recruited his friend, Jose Luis Iglesias ("Chegui") to help him (tr. 253, 258-260; Government's summation: 84A).

Thereafter, in the latter part of August, Rivera testified that he made the second of his five trips to California to pick up heroin (tr.260-262). There he picked up fourteen 9-ounce packages of heroin and returned to New York (tr.264-267). When he returned, he stored the heroin at Chegui's mother's house (tr.267-269) and thereafter the two partners started selling the heroin to various customers, including appellants Jose Velasquez, (Vaquero), Angelo Roche, Luis Nunez-Ramos (Indio) and Antonio Morales (tr.270-272,311). In all, they collected about \$145,000 for the heroin from that second trip, and Rivera's share was \$15,000* (tr.311-313).

*Iglesias pleaded guilty before jury selection was completed. He was sentenced on August 21, 1977 after the trial was over, to a five year prison term. He did not testify at the trial. He did submit an affidavit in support of another defendant's post-trial motion to the effect that Rivera had perjured himself at the trial. See Appendix pp. 698-699.

Shortly thereafter, Rivera made a third trip, returning and selling the sixteen packages of heroin that he got there to numerous customers, and this time earning \$20,000 for himself (tr.329-345). Similarly, in October of 1974, Rivera made a fourth trip to California and again brought back heroin for distribution (tr.350-352). After each of these trips, he testified that heroin was distributed to Appellants Velasquez, Roche, and Nunez Ramos, and he added that Antonio Morales purchased one package after his third trip. During Rivera's fifth and final trip to California, he was joined by Fernando Gallardo because of difficulties that he encountered in receiving the heroin, which caused him to call New York (tr.369). After Gallardo arrived, however, they received 35 packages, and after some complaints and problems concerning the quality of the heroin they returned to New York and distributed it to various customers (tr.370-393). Rivera, in a period of approximately 15-20 days collected over \$200,000 (tr.392-393). According to Rivera's testimony, his customers to whom he distributed the packages which he brought back from his five trips to California included the appellants Jose Velasquez (Vaquero), Angelo Roche, Luis Nunez-Ramos (Indio), Antonio Morales, and Carlos Rivera-Santiago (Carlitos).

After his last trip to California, Rivera testified that he continued selling heroin, some of which he received from Appellant Zayas and, with the assistance of his partner, Iglesias, he disposed of large quantities of heroin through the Spring of 1975 handing the money over to Martha Machado and other members of the Gallardo organizations higher command (tr.423,425-427).

Raymond Rossy, another named defendant, testified that he purchased heroin from Fernando Gallardo in the fall of 1974 (tr.1310-1325) and that in January, 1975, he was told by Fernando Gallardo that Benito Cruz was taking over his business (tr.1328-1329).

Benito Cruz testified that he started working for Gallardo in January, 1975 and in that month he distributed 17 kilograms of heroin for Gallardo, received \$850,000, and paid \$500,000 to Gallardo telling some of the customers to pay Gallardo directly (tr.2178-2179). In a 12-14 day period in January, 1975, Cruz testified that he made approximately \$50,000 (tr.2179). Cruz and Rossy stopped working for Gallardo, although they continued to be in the heroin business.

In February or March of 1975, Rossy learned that Cruz was no longer working for Gallardo. He started buying heroin from him, and another, Jose Rivera, on a weekly basis (tr.1341-1344).

Subsequently, Cruz and Rossy made several sales of heroin to Jose Guzman - a United States Drug Enforcement Agent who testified at the trial. Following their arrests in late 1975, Rossy went to California and led the police to his heroin source there (tr.1354-1355, 1357-1361, 1565-1588, 2208-2210, 2213-2222).

The balance of the evidence was essentially an attempt to corroborate the aforementioned witnesses. In addition to various documents and stipulations, police officers testified to searches and the arrests of various conspirators and defendants, and thereby admitted various items of tangible evidence and heroin. Similarly, several New York City undercover police testified to purchases from certain defendants.

POINT I

THE DEFENDANTS WERE SERIOUSLY PREJUDICED
BY HAVING BEEN TRIED TOGETHER ON THE
CONSPIRACY AND SUBSTANTIVE COUNTS AND
THEIR CONVICTIONS SHOULD THEREFORE BE REVERSED

Prosecutions of conspiracy should be limited to instances of tight, clearly defined plots to violate the law where the participants work closely together. The instant prosecution prejudiced the Defendants because, from the viewpoint of the Defendants on trial, the "conspiracy" was merely a loose association of opportunists dazzled by the possibility of quick riches. The Supreme Court recognized this danger of prejudice in Kotteakos v. United States, 328 U.S. 750 (1945), where it was said:

"That offense (conspiracy) is perhaps not greatly different from others where the scheme charged is tight and the number involved is small. But as it is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals becomes greater and greater."
(328 U.S. at 776)

* * * *

"Obviously the burden of defense to a defendant, connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate." (328 U.S. at 766-767).

In United States v. Miley, 513 F.2d 1191, 1195 (2d Cir. 1975) cert. denied, 423 U.S. 842, this Court cautioned against the "Government's ill-advised practice of attempting to obtain

in a single trial convictions of numerous defendants who are only loosely connected in a criminal enterprise."

The jury's deliberations in the instant case were influenced to Defendants' serious prejudice by their joint prosecution at a single trial for a conspiracy to violate the narcotic law and for 28 alleged substantive violations of the narcotic law. About half of the Government's direct case consisted of descriptions of the crimes committed by the principal heroin importers and traffickers in the Gallardo organization who were not on trial.¹

The heroin placed in evidence was, with one exception (tr.2506), not evidence of acts the Defendants were accused of, but had generally been seized from conspirators not on trial before the jury (tr.1228-1231, 1560-1565).

There was, thus, a great danger that the Defendants would be found guilty by association. The danger was realized.

"The law in this Circuit is clear. Appellants can only succeed in this argument (prejudicial joinder) if they show ... prejudice," United States v. Variano, 550 F.2d 1330, 1334 (2d Cir. 1977).

¹Raymond Rivera (tr. 312-330, 370-391, 395-407, 409-418, 426-444); Sosa (tr.1143-1167); Louis Rodriguez (tr.1188-1199); Burbage (tr.1227-1242); Garcia (tr.1277-1289); Rossy (tr.2395-1324, 1327-1332, 1342-1361); Guzman (tr.1535-1542, 1557, 1695-1696); Hoelker (tr.1800-1822); Valentine (tr.1823-1835, 1839-1855); Valley (tr.1938-1945); Cruz (tr.2019-2031, 2035-2039; 2050-2062, 2068-2080, 2085-2092, 2111-2118, 2123-2125, 2178-2183, 2191-2194, 2200-2205, 2208-2222); Roman (tr.2472-2474); Raphael Rivera (tr.2484-2501).

Convictions were overturned on a finding of substantial prejudice in United States v. Bertolotti, 525 F.2d 149 (2d Cir. 1975), and United States v. Branker, 395 F.2d 881 (2d Cir. 1968).

In Variano, supra, the Court listed some factors which it said would tend to demonstrate prejudice from the "spill-over effect." The factors listed were "the number of substantive counts, the number of defendants, the length of the trial, the extent of the permissible evidence against each defendant, and the extent of the judge's cautioning instructions to the jury" (550 F.2d at 1334). The factors making for prejudice existed in the instant case. There were 28 substantive counts in the 19-page indictment, 24 defendants were named and eight were on trial, the trial lasted five weeks, and evidence of the acts of all 24 defendants and other individuals was admitted in evidence. Although the trial judge cautioned the jury at length, the prejudice in the instant case could not be cured.

As prejudice is a factual issue, the precedential value of the cases cited is in their recognition of the general principal that prejudice may inhere in multi-defendant conspiracy prosecutions. The circumstances of the instant case establish serious prejudice.

The Defendants on trial, seven "retail" sellers and one delivery boy (Anthony Rodriguez) were "the lowest echelon" of the Gallardo organization. See United States V. Bentvena

319 F.2d 916, 950, (2d Cir. 1963). The trial was a drama in which the principal actors' offstage intrigues lent color to the minor actors' drab, but onstage, roles.² In this case, the principal figures were fugitives (tr.568) or were not prosecuted by the Federal Government (tr.673, 1295, 1765-1766, 2027). But the principals' inside information about the organization's higher structure was used either in direct testimony or by admitted hearsay³ to trap the Defendants on trial. The defendants on trial, the minor and occasional actors on the fringes of the work, did not have actual knowledge of the high-level intrigues of the chiefs which were nevertheless used to prosecute them.⁴

²For instance, Raymond Rivera told of his heroin-buying trip to California where Fernando Gallardo joined him. They drove to Tijuana and back and then spent the night drying out the heroin in an oven in the California home of the Mexican connection (tr.375-388). On another occasion, a wholesaler delivered his goods in a paper bag topped with green grapes which he ate (tr.1842). Gallardo was vividly described counting thousands of dollars in small bills (tr.311-312). The testimony concerning the Defendants on trial was, as a rule, a dry record of orders and purchases. See e.g. (tr.243-245, 250-251, 271-272, 277-278).

³The Second Circuit rule that a co-conspirator's hearsay is admissible is being challenged in Daley v. United States, 46 L.W. 3409 (Jan. 3, 1978), cert. filed.

⁴Defendants concede that in this Circuit knowledge may be inferred from possession of saleable quantities of heroin. See e.g. United States v. Magnano, 543 F.2d 431 (2d Cir. 1976). cert. denied U.S. The trial judge avoided charging the jury that the inference is permissible.

The jury could not fail to have been confused and influenced to each Defendant's serious prejudice by the voluminous and lively testimony concerning the principals' crimes. The prosecution, no doubt, counted on the "spillover effect" but hoped for a finding that the effect was "harmless".

Economy could not have been the prosecutor's motive for the joint trial, for the participation of eight (originally 24) defendants, and their lawyers, together with proof of the conspiracy lengthened and complicated the trial enormously. The trial lasted five weeks. The transcript covers 3,734 pages. Defense counsel's opening statements, summations, and cross-examinations of Government witnesses consumed 1,443 transcript pages. It took the writer of this point⁵ 45 hours to read and outline the transcript. Sifting and summarizing the evidence occupied another 17 hours. Consider the plight of the jurors (who spent five weeks in the jury box without the advantage of taking one note) when the trial judge admonished them to rely only on their recollections of the evidence (tr.3496). It is no wonder that the jury's early request during deliberations was to rehear all the testimony given by the Government agents (tr.3607). The request was not granted in full as it was deemed too burdensome (tr.3611-3612, 3630).

As this Court said in United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975), speaking of the prejudice flowing from proof of many conspiracies where only one is charged:

⁵Bonnie P. Josephs, assigned counsel for Anthony Rodriguez.

"It may generally be conceded that the possibility of prejudice ... increases with the number of defendants tried and the number of conspiracies proven ... "Numbers are vitally important in trial, especially in criminal matters!."

* * * * *

"The possibilities of spill-over effect from testimony on these transactions are patent when the number of conspiracies, the number of defendants and the volume of evidence are weighed against the ability of the jury to give each defendant the individual consideration our system requires ... (There are) inherent dangers of combining unrelated criminal acts under the roof of an alleged single conspiracy."

The finding of prejudice in United States v. Branker, 395 F.2d 881 (2d Cir. 1968), where the conspiracy count was dismissed and the defendants were convicted on the substantive counts, is equally applicable in the instant case. This Court reasoned in Branker (395 F.2d at 887-888):

"It is obvious that as the number of counts is increased, the record becomes more complex and it is more difficult for a juror to keep the various charges against the several defendants and the testimony as to each of them separate in his mind. See United States v. Bufalino, 285 F.2d 408, 417 (2d Cir. 1960). See also Kotteakos v. United States, 328 U.S. 750, 766-767 (1946).

"This kind of prejudice is particularly injurious to defendants who are charged in only a few of the many counts, who are involved in only a small proportion of the evidence, and who are linked with only one or two of their co-defendants. The jury is subjected to weeks of trial dealing with dozens of incidents of criminal misconduct which do not involve these defendants in any way.. As trial days go by, 'the mounting proof of the guilt of one is likely to affect another.' Schaffer v. United States, 362 U.S. 511, 523 (1960) (Douglas, J., Dissenting)."

The trial judge was very careful to give limiting instructions, exhorting the jury to consider each Defendant separately (e.g. tr. 3556, 3569). But "(t)he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . , all practicing lawyers know to be mitigated fiction." United States v. Krulewitch, 336 U.S. 440, 453 (1948) (Jackson, J., concurring).

The fiction is exposed in this case by the jury's questions during their deliberations and their verdict. Unlike the jurors in United States v. Bentvena, 319 F.2d 916, 952 (2d Cir. 1963), the jury in this case showed their inability to consider each Defendant's culpability apart from the others' and theco-conspirators'. Indeed, the jurors confused the Defendants on trial with the unindicted witnesses and the other co-conspirators.

The jury first asked to rehear all the testimony of the Government's agents (tr.3607). When the trial judge suggested that the request be trimmed, the jury's confusion became manifest. The second question sought the "testimony of undercover agents who found heroin on seven of the Defendants, not except Angelo . . . and from whom the agents bought heroin" (tr.3622-3623). The jury were wrong about the facts. Except for Defendant Velasquez (tr. 2466) the Defendants on trial were not arrested on the conspiracy charges. with heroin in their possession.

It was the principal conspirators, Cruz, Gutierrez, Rossey (who testified), Gallardo (who fled), and other conspirators not on trial who were caught redhanded with heroin, paraphernalia or large amounts of money.⁶

Sizeable quantities of heroin, money and paraphernalia seized from persons not on trial were presented to the jury (tr. 1229-1230, 1235-1236, 1241-2342, 1561-1564, 1569, 1574, 1581-1583, 1588, 2488-2491, 2496-2500). Except for one defendant, none of the heroin in evidence was seized from anyone on trial. The court refused to clear the jury's confusion by an explicit instruction telling them that they were mistaken about the facts (tr.3636-37). Instead, the agents' testimony was reread without comment (tr.3643,3673).

The failure to attempt to clear the jury's evident confusion was error. As the court said in United States v. Bolden, 514 F.2d 1301, 1308 (1975 D.C. C .), ". . . . when a jury shows confusion, a trial judge is under an obligation to respond"

⁶ Rivera's sales to undercover agents (tr.638, 1225); arrest of Francisco Machado with heroin, money and paraphernalia (tr.1229-1231); arrest and seizure of money, heroin and paraphernalia from Felix Machado (tr. 1233-1236); arrest of Fernando Gallardo with \$35,000 (tr.1239-1241); Rossey's sale to agent (tr.1299-1300); Umberto's delivery to agent (tr.1359-1361); transactions by Cruz and Rossey with agents and arrest of Cruz (tr.1565-1583); seizure of 46 lbs of heroin from California house (tr.1815); arrest of "Chequi" with money (tr.1943--1945); arrest of Cruz with heroin (tr.2022); Cruz's sales to agents (tr.2208-2228); Torres' sales to agents (tr.2496-2500); Felix' and Torres' sale to agent (tr. 2489-2491).

In Bollenbach v United States, 326 U.S. 607 (1945), the trial judge had failed to clarify the jury's confusion explicit in a question about a point of law. The Court held the failure error because it found that special care is indicated when the jury demonstrates it has a problem; and the failure of the trial judge to clarify the confusion was prejudicial to the defendants. The Court reasoned in Bollenbach, supra, 326 U.S. at 612, "'The influence of the trial judge on the jury is necessarily and properly of great weight.' . . . paarticularly in a criminal trial, the judge's last word (or silence) is apt to be the decisive word."

In Powell v. United States, 347 F.2d 156 (9th Cir.1965), a question from the jury made it apparent that they were confused about the legal test to be applied to the facts. The court responded so that the jury nevertheless could have applied the wrong test. The appellate court reversed the conviction on the ground that the trial court's instruction did not dispel the jury's confusion.

A parallel situation exists in the instant case. Here the jury ascribed the evidence of unindicted co-conspirators' possession of heroin to the Defendants themselves. The response of the trial judge, simply to have testimony reread, was not designed to dispel the confusion. Thus, the jury might have persisted in believing that seven of the Defendants were arrested with heroin in their possession.

The verdict does not dispel the impression that the jurors were unable to distinguish the Defendants from one

another or the unindicted witnesses. Each Defendant was found guilty of every charge. This was not one of the "legion of cases" referred to in United States v. Bentvena, 319 F.2d 916, 949-950 (2d Cir. 1963), "in which defendants are convicted on some counts, acquitted on others, cleared of conspiracy, convicted on substantive counts and vice-versa."

A curative instruction, in any event, would not have cured the prejudice; for that was integral to this joint trial of eight defendants, each represented by separate counsel.

A "big case" mentality affected the proceedings adding improper weight to each Defendant's separate acts. The prosecutor was impelled by it, for example, to overstate the case against Defendant Anthony Rodriguez in his opening remarks. Rodriguez was called "a primary partner" of Gutierrez (known as "Cuba"), "a major customer and distributor within the Gallardo organization" (tr.125). The proof at the trial did not bear out this characterization of Rodriguez. Rodriguez was not shown to have trafficked in heroin for profit. He was an addict (tr.1465) who hung on the fringes of the organization and basked in Cuba's reflected light. Rodriguez was no more than Cuba's errand boy (tr.1836) whose reward for the great risks he was taking was a reliable source of the drug he needed (tr.2126-2127), and brilliant associations above his station.

The only substantive count against Anthony Rodriguez was his delivery of 1/4 kilogram of heroin for Cuba to Raymond Valentine, a retailer not on trial (Indictment, Count 27; see tr 1836). His other acts were sitting at the wheel of Cuba's Cadillac (tr.1232, 1249), and associating on street corners (tr. 1237,1239, 1250) and at parties (tr.1325) with the important people. Gallardo took care of "Little Tony" by making sure he had a supply of heroin (tr.2126-2127) even though the professional middlemen like Cruz wanted no dealings with him (tr. 2127).

The prosecutor told the jury, too, that the conspiracy was "immensely profitable" (tr.110); but there was no proof at the trial that any of the Defendants on trial made vast sums (or any sums) of money from the sale of narcotics.

The judge admonished the jury that the lawyers' statements were not evidence (tr.138-139) but the reminder did not come until after the prosecutor wrongly branded Anthony Rodriguez as a central figure in the plot and intimated that the Defendants on trial had become millionnaires.

A large number of Defendants and, necessarily, counsel also guaranteed tedium and delay. Each Defendant was prejudiced by the jury's inattention when the inevitable repetitions during each counsel's cross-examination, opening statement and summation evoked boredom. One juror appears to have slept through much of the proceedings and another had her back turned. (tr.3274).

The trial was often interrupted by objections followed by long colloquies during which each defense lawyer had his say (see e.g. tr. 1590-1694). The answers to the jury's questions during deliberations were also held up for long times because of the inevitable difficulties of obtaining the agreement of the eight defense lawyers and two prosecutors on how the responses should be framed. (See, e.g. tr. 3621-3638). Though it was unavoidable, the delay was prejudicial and in violation of the applicable standards. See United States v. Pfingst, 477 F.2d 177, 197 (2d Cir. 1973).⁷

Though the jury were exhorted by the trial judge to give each Defendant individual attention during the deliberations, the trial judge himself declined to identify particular Defendants in his charge when a portion of the charge concerned that Defendant only (tr.2964). The charge on intoxication, for example, did not refer to Anthony Rodriguez. Given the jury's confusion of the Defendants with the witnesses, the jury might also have believed that the intoxication charge concerned witness Raymond Rivera's intent to further the conspiracy. Rivera, too, was addicted to heroin. (tr.579).

The trial judge charged that a co-conspirator's acts are attributable to the other conspirators (tr.3547, 3557), but failed specifically to limit the application of the theory to proof of the conspiracy. As has been shown, the jury mistook the Defendants for the co-conspirators who were

⁷There is no suggestion that defense counsel purposely lengthened the proceedings. On the contrary, their good faith diligence made the delay unavoidable.

apprehended with heroin in their possession. In reaching that conclusion, the jury might well have misapplied the principle of responsibility for co-conspirators' acts.

The propriety of multi-defendant conspiracy prosecutions is questionable when, as in the instant case, the alleged conspiracy is loose-knit and the accused are the relatively minor participants who are not privy to the actions of the chiefs. The service to the public interest of such prosecutions is dwarfed by the inevitable prejudice to the accuseds' rights to be judged only for their own actions alone and not the actions of others.

POINT II

THE PROSECUTOR'S PREJUDICIAL CONDUCT DEPRIVED APPELLANTS OF A FAIR TRIAL

" The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 75,88.

In the instant case, the prosecutor, in the following remarks, delivered to the jury during the course of his rebuttal summation, said the following:

"But perhaps more fundamental to the charge that the government in this case had put the suggestion into the government's witnesses whom they should testify against, that somehow an agent of the federal government has decided that he will try and obtain the conviction of innocent people by putting the names of innocent people into the mouths of government witnesses, if you think that I, if you think that Mr. Ziegler or any other federal agent would jeopardize his or her career beyond a reasonable doubt to convict these people by doing such a thing, then take about 30 seconds in your deliberations; if you think that is what happened here, come back in 30 seconds and acquit every one of them; if that is what this case is about and you think that is what this case is about, you have no business taking any more time than 30 seconds." (tr.3391).

By interjecting his own personal reputation and career into his argument to the jury, the prosecutor, in substance, was vouching for the credibility of his witnesses and interjecting his own personal belief into the case. This prejudicial argument was error. United States v. Spangelet, 258 F.2d 338 (2nd Cir. 1958); United States v. Hestie, 439 F.2d. 1971).

Furthermore, it should be noted that in contrast to the situation found in United States v. Traumunti, 513 F.2d 1087 (2d Cir.1975), the remarks of the prosecutor were not a reaction to the defense lawyer. Indeed, none of the attorneys for the appellants in this joint-brief attacked the government, and they should not have to suffer for the acts of another attorney, if this Court finds that the remarks referred to were made in response to the remarks of one defense attorney. The government affirmatively decided to indict, and therefore to try, many different defendants together. Taken as a whole, the defense did not attack the government or the United States Attorney's office. It was, therefore, improper to allow the prosecutor to inject his credibility and reputation in such a strong "shot-gun" fashion directed at all of the defendants, in reply to a real or imagined attack by only one of the nine attorneys.

POINT III

THE FAILURE OF THE GOVERNMENT TO DISCLOSE THAT THE UNLAWFUL ACTS ALLEGED TO HAVE BEEN COMMITTED BY THE DEFENDANT-APPELLANT CARLOS SANTIAGO OCCURRED DURING THE SECOND AND THIRD WEEKS OF OCTOBER, 1974, RATHER THAN THE THIRD AND FOURTH WEEKS OF OCTOBER, 1974, AS WAS IN FACT INDICATED BY THE GOVERNMENT, CONSTITUTED SUCH HARM AND PREJUDICE TO THE DEFENDANT-APPELLANT CARLOS SANTIAGO AS TO REQUIRE A NEW TRIAL.

Defendant-appellant Carlos Santiago was arrested in Puerto Rico for the charges in the instant indictment (No. 77Cr. 100). He was subsequently removed to the Southern District of New York, and on April 4, 1977 was released upon posting a twenty-five thousand dollar surety bond.

The trial of defendant-appellant Carlos Santiago and eight co-defendants was scheduled before the Hon. Vincent L. Broderick, who encouraged counsel to engage in informal pre-trial discovery and disclosure, a course of action in which counsel for defendant-appellant Carlos Santiago concurred. In the course of this discovery and disclosure, and shortly after Mr. Santiago's release on bail, it was stated by Assistant U.S. Attorney James A. Moss to counsel for Mr. Santiago that the violations of the federal narcotics laws relating to conspiracy and to the distribution and possession with intent to distribute two and one-half kilograms of heroin, were probably committed during the third and fourth weeks of October, 1974, although the indictment, insofar as it refers to Mr. Santiago (Count 18) merely referred to acts committed in October, 1974.

Armed with this more specific information, which had been passed on to him by his counsel, Mr. Santiago returned to his home in Puerto Rico on April 7, 1977, and engaged in the preparation of an alibi defense. He returned to the Southern District of New York for a pre-trial conference on April 29, 1977, when he gave his counsel three items of potential evidence which indicated his presence in Puerto Rico during the third and fourth weeks of October, 1974; specifically October 21, 25 and October 30, 1974. Mr. Santiago then returned to Puerto Rico for other alibi evidence and, again following the instructions of his counsel, concentrated on the third and fourth weeks of October, 1974.

On May 17, 1977, Mr. Santiago's counsel received from Assistant U.S. Attorney James A. Moss a letter demanding a written notice of alibi, wherein it was again stated that the "two offenses (Count 18 of the indictment) are alleged to have been committed by your client (i) in October, 1974 (probably during the third and fourth weeks of that month,)." This was eight days before the trial was to begin, and the demand was fulfilled in a timely fashion.

The trial of Carlos Santiago, and the other defendants commenced on May 25, 1977, with Mr. Santiago appearing and unable to produce any additional items of evidence as to his presence in Puerto Rico during the third and fourth weeks of October, 1974. Had he been able to produce such additional evidence as to his presence in Puerto Rico during the third and fourth weeks of October, 1974, the futility of his efforts would have soon become apparent, for it was only at that time -- at the beginning of the trial -- that Assistant United

States Attorney Moss announced that the criminal acts supposedly committed by Mr. Santiago occurred during the second and third weeks of October, 1974, and not "probably during the third and fourth weeks of October, 1974," as had been previously indicated. Counsel for Mr. Santiago objected strenuously, citing the prejudice to his client, and requested a continuance or a severance from the trial. Those reasonable and necessary requests were denied by the Court (tr.p.52-62).

The Government's only witness against Mr. Santiago was Raymond Rivera, who testified that Santiago, along with one of the co-defendants, possessed and distributed nine quarter-kilogram packages of heroin during October, 1974. He tracked the time of Mr. Santiago's activities from a day in mid-October, 1974, when he had gone to Puerto Rico to deposit money in a bank for William Cortes-Rios, an unindicted co-conspirator. On cross examination by counsel for Mr. Santiago (tr.p.576-598) Rivera frequently equivocated as to the time in October, 1974 that the criminal activities of Mr. Santiago occurred, and he could in no way be specific. The result was that the entire month of October, 1974, was left as a time when the criminal acts of Mr. Santiago were alleged to have occurred. (tr. p. 576-598). From all of the testimony of Raymond Rivera against defendant-appellant Santiago it is difficult to say whether these acts occurred at the beginning, the middle or the end of October, 1974.

In the face of this Mr. Santiago testified in his own behalf and presented to the jury what was, in effect, only half of an alibi. Evidence was introduced placing him in Puerto Rico

on October 21, 25 and either the 30th or 31st of October, 1974. (tr. p.2761-2762). Additionally, Mr. Santiago testified that he had been in Puerto Rico during the entire month of October, 1974. (tr.p.2764). The jury was never to hear why Santiago had no evidence to show his presence in Puerto Rico during the first half of October, 1974, notwithstanding the Assistant U.S. Attorney's pointed question to that effect on cross-examination.

The situation presented is one in which the Government disclosed incorrect and misleading information, rather than no information at all, and it is submitted that this resulted from inadvertence rather than design. The result, however, is the same and the guiding principle has been previously enunciated:

When the Government's failure to disclose is inadvertent, a new trial is required only if there is a significant chance that this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.

U.S. v. Rosner, (1975, CA 2 NY), 516 F 2d 269
Id. U.S. v. Miller, 411 F.2d 825, 832 (2 Cir., 1969); see U.S. v. Keogh, 391 F2d 138, 147-148 (2 Cir., 1968)

It may be argued by the Government that, notwithstanding the statement that the defendant-appellant's criminal acts were alleged to have been committed "probably during the third and fourth weeks of October, 1974," the defendant-appellant was bound by the wording of Count 18 of the indictment, which referred to the entire month of October. However, it should be remembered that defendant-appellant, when he returned to Puerto Rico to prepare his defense, was faced with the task of preparing

an alibi defense to cover a period of time that had occurred two and one-half years earlier. Under any set of circumstances this is a monumental task, and if the defendant-appellant leaped at the suggestion that he account for his activities for a period of only two weeks, he cannot and should not be penalized. Whatever officiousness induced the Government to offer this suggestion resulted in the defendant-appellant's case preparation being seriously hindered rather than helped. If the Government were merely trying to be helpful then, to be sure, with friends like this Mr. Santiago does not need enemies. Had no such suggestion been offered Mr. Santiago would have been instructed by his counsel to prepare a defense for the entire month of October, 1974.

It may be further argued by the Government that its estimates of defendant-appellant's criminal activity period were arrived at by backtracking from statements of witnesses, telephone toll records and other evidence. If this is the case then the Government failed to anticipate that Raymond Rivera, its chief witness against Mr. Santiago, was in no way possessed of an equal ability to keep his dates straight, for his testimony roamed, nay, meandered through the entire month of October, 1974, with respect to the defendant-appellant, thereby rendering whatever efforts at case preparation the defendant-appellant made, virtually useless. (tr.p.576-598).

Ultimately, the question to be addressed is whether "this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." U.S. v. Rosner, supra. It is

significant that near the end of its deliberations, the jury asked for, and was given, a reading of the cross-examination of Raymond Rivera by defendant-appellant's counsel; a cross-examination in which it was attempted by every means possible to pin Rivera down as to the times in October, 1974 when the alleged criminal acts of defendant-appellant occurred.

(tr. p. 576-598). It was evident that the jury was also concerned about this matter and was giving it proper attention. Unfortunately for Mr. Santiago, however, Rivera was unable to specify when in October, 1974 the alleged illegal transactions occurred, and defendant-appellant had only half a defense. He was ultimately convicted of both the conspiracy and the substantive count in the indictment and on February 2, 1978, received a fifteen year term of imprisonment under Title 18, Sec. 4205 (B), United States Code.

Had the defendant-appellant Carlos Santiago been correctly advised -- or not advised at all by the Government -- as to the period in October, 1974, when he allegedly violated the federal narcotics laws, he would have been better able to prepare his defense. The result would have been to induce a reasonable doubt in the minds of enough jurors to avoid a conviction.

POINT IV

THE DEFENDANT ORLANDO MACHADO WAS DEPRIVED
OF HIS RIGHT TO CONTEST HIS IN-COURT IDENTI-
FICATION BY ESTABLISHING AN ALIBI DEFENSE
AND THROUGH PRETRIAL LINEUPS AND HEARINGS.

The Government improperly and in violation of the Brady v. Maryland Doctrine improperly failed to inform the defense attorney of in-court identifications of Appellant ORLANDO MACHADO. Moreover, the Government represented, prior to the trial, that there would be testimony concerning Machado.

The practice in the Southern District of New York in defense of criminal matters is for the defense attorneys and the Government to sit down at a pretrial conference to "work out" discovery and the need for any possible pretrial motions or hearings. This practice was adopted by the trial court and was adhered to by the defense attorneys.

This practice is in lieu of any motions or demands for bills of particulars on paper but it is submitted that it is just as binding.

At the pretrial conference, the Government informed the defense that the only evidence against the defendant ORLANDO MACHADO was that he had taken a trip with a co-conspirator to California for the purchase of drugs and that he had returned with the co-conspirator from California with the drugs. There was also some representation concerning how the defendant got sick and someone else had to handle the drugs (tr.2180,2224).

The first witness for the Government, Raymond Rivera-Rodriguez (tr.194-756,763), testified that he "had sold heroin to "Fernando Machado" and then proceeded to identify the defendant Orlando Machado (tr.329-330). This came as a complete surprise to the defendant, to his attorney and possibly to the Government (p.445 et seq). The defendant claimed surprise and the court took the motion under advisement. The identification was further complicated by the fact that the Government made the representation ~~that~~ the witness had identified the picture of Fernando Machado, the defendant's brother, as being the person he sold the drugs to and not the defendant, Orlando Machado (tr.446). The matter was compounded even further on cross examination when the witness again identified Orlando Machado as the person he sold drugs to and this was done after the luncheon recess wherein the Government had represented that he had mis-identified the pictures (tr.446-458). The mis-identification and the close relationship of the brothers involved in this conspiracy dictated that one or more lineups should have been held to see if a proper identification could have been made.

The Government's pretrial misrepresentations forced the false highlighting of the defendant's role in the conspiracy by forcing the defense to cross-examine and the court to charge the jury.

This misleading of the defense in pretrial conferences is contumacious of the practice in the Southern District of New York and must be condemned by reversing Orlando Machado's conviction.

POINT V

THE SENTENCING PROCESS WAS UNFAIR

All nine defendants who went to trial were convicted. Seven were sentenced to 15 year terms of imprisonment. Orlando Machado, who was given mental tests prior to sentence and was found to have an IQ of 60, was sentenced to nine years. Except for those two defendants whose medical and mental conditions are extreme, the Court imposed a uniform 15 year sentence on each defendant who was convicted after trial, regardless of the role of each particular defendant, or the level that each played in the conspiracy.

Although the trial evidence disclosed great differences among their degree of culpability, and no doubt the pre-sentence conferences with the attorneys reflected those differences, the weight given by the sentencing court to one factor - the crime of which the defendants were convicted - was so great as to prevent appropriate consideration of other mitigating factors. That the Court was impressed by that factor to the exclusion of others is reflected in the transcript of the sentencing of Domingo Zayas, when the Court said:

"On the question of degree of culpability, when you have an operation as large as this one, I am not sure that the degree of culpability really means very much. Mr. Zayas was found to be a conspirator, and he was found guilty of substantive charges." (Transcript of Sentence, 9/19/77, p.7).

Use of one factor to set the standard for punishment without due regard for mitigating circumstances, resulting in fixed sentences for classes of crimes is not permissible. The use by the court of a fixed, mechanical approach in imposing sentence, rather carefully appraising the individual

factors of each defendant's background and culpability which would have been relevant to sentencing upon an individual basis, warrants resentence of each of the defendants before a different judge. Williams v. New York, 337 U.S. 241 (1949); Williams v. Oklahoma, 358 U.S. 576 (1959); United States v. Schwarz 500 F2d 1350, (2d Cir.1974); United States v. Kaylor, 491 F2d 1133 (2d Cir.1974).

Because of the court's expressed attitude toward the crime, each of the defendants (with the exception of the 60 IQ Machado, and the addict, Rodriguez) received the same harsh sentence, whether they committed only one or two isolated acts on a small scale, or whether they were active and important participants in the conspiracy charged.

In addition to the lack of disparity among the sentence of those defendants who stood trial and who were convicted after trial, there is another contrast that results in totally defeating the efforts for equality and fairness in sentencing which is the concern of this and all other American Courts. United States v. Robin, 545 F.2d 775, 782, (1976); Rubin, From Disparity and Equality of Sentences - A Constitutional Challenge, 40 F.R.D. 55; Coburn, Disparity in Sentences and Appellate Review of Sentencing, 25 Rutgers Law Review 207 (1971). That contrast is the disparity between the defendant-appellants who stood trial and who were sentenced to 15 years in prison, and the defendant Jose Luis Iglesias* who pleaded guilty after jury selection began, and who was sentenced to only a five-year term, despite his rather high position in the conspiracy as the

*(Iglesias did not testify, nor did he cooperate with the government. In fact, he submitted an affidavit in support of defendant Machado's post trial motion, which was withdrawn prior to any hearing. See Appendix p.698).

partner of Raymond Rivera, the distributor of a huge amount of heroin. This sentence was imposed after the Court had heard of the extent of Iglesia's participation in the conspiracy from Raymond Rivera and other prosecution witnesses. The sentencing of a major defendant such as Iglesias to a relatively light sentence, and then the sentencing of other low echelon, defendants to harsh sentences, regardless of their degree of involvement or prior backgrounds, without any justification appearing in the record, amounts to differences in sentence which are unrelated to the consideration of appropriate aggravating and mitigating circumstances. This court should, therefore, correct such improper disparity by ordering the resentencing of appellants before another judge. United States v. Wiley, 278 F2d 500 (7th Cir. 1960): United States v. Robin, supra: United States v. Stein 544 F2d 96 (1976).

POINT VI

APPELLANTS JOIN IN ALL APPLICABLE
POINTS WHICH APPEAR IN THE BRIEFS
FOR THE OTHER DEFENDANT-APPELLANTS
HEREIN

CONCLUSION

THE JUDGEMENTS APPEALED FROM SHOULD BE REVERSED AND
A NEW TRIAL ORDERED; OR IN THE ALTERNATIVE THE
DEFENDANTS SHOULD BE RESENTENCED BY A DIFFERENT JUDGE.

DATED, February 1978

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

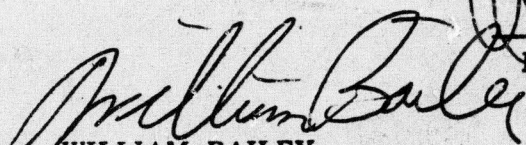
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 22 day of Feb., 1978 at No. 1 St. Andrews Pl., NYC

deponent served the within Brief
upon U.S. Atty. So. Dist. of NY

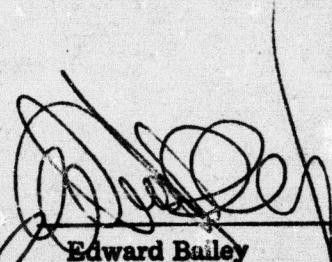
the Appellee herein, by delivering 3 true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
22 day of Feb. 1978



WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1978


Edward Bailey